

FISHER & PHILLIPS LLP  
SCOTT M. MAHONEY, ESQ.  
Nevada Bar No. 1099  
3800 Howard Hughes Parkway  
Suite 950  
Las Vegas, NV 89169  
Telephone: (702) 252-3131  
Facsimile: (702) 252-7411

Attorneys for Defendant

**UNITED STATES DISTRICT COURT**

**DISTRICT OF NEVADA**

OLIVIA ELLIOTT,	)	Case No.: 2:09-cv-00740-KJD-GWF
	)	
Plaintiff,	)	<b>REPLY TO OPPOSITION TO</b>
	)	<b>MOTION FOR SUMMARY</b>
vs.	)	<b>JUDGMENT</b>
	)	
FIESTA PALMS, LLC, a Nevada	)	
limited liability company, dba	)	
PALMS CASINO RESORT,	)	
	)	
Defendant.	)	
	)	

Defendant, Fiesta Palms, LLC dba Palms Casino Resort (“Palms”), by and through its counsel, Fisher & Phillips LLP, hereby replies to plaintiff’s Opposition to Defendant’s Motion for Summary Judgment (docket #21) (the “Opposition”).

**MEMORANDUM OF POINTS AND AUTHORITIES**

**INTRODUCTION**

Rule 56(e)(2) requires a party opposing a summary judgment motion to “set out specific facts showing a genuine issue for trial.” Only admissible evidence is to be considered, and proper authentication of evidence is a prerequisite to admissibility. *Orr v. Bank of America*, 285 F.3d 764, 773 (9th Cir. 2002).

1 Through an extension, Elliott got 39 days to oppose Palms' Motion for  
 2 Summary Judgment (the "Motion"). The Opposition consists of approximately three  
 3 pages of what some might call substantive text, but this text is actually of no legal  
 4 significance because it does not reference any properly-authenticated exhibits<sup>1</sup> and  
 5 Elliott failed to provide a statement setting forth material issues which are factually in  
 6 dispute, as required by Local Rule 56-1. Among other things, Elliott does not dispute  
 7 that she was hired at age 56, subjected to no age-related comments, committed 19 rake  
 8 policy violations, a male Caucasian employee was terminated for the same offense at  
 9 the same time and a significant part of the Poker Room workforce is age 40 or older.  
 10

11 ***Summary Judgment Is Appropriate On Elliott's***  
 12 ***Various Discrimination Claims. Establishing A Prima***  
 13 ***Facie Case, Which Elliott Did Not Do, Is Not Enough***  
 14 ***To Avoid Summary Judgment, And The Merits Or***  
 15 ***Fairness Of The Termination Decision Is Irrelevant.***

16 The Opposition claims Elliott has met the four elements of a *prima facie* claim  
 17 of discrimination. As discussed at pages 5-7 of the Motion, she is wrong. However,  
 18 even if Elliott established a *prima facie* case, that is not the end of the analysis.  
 19 *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148 (2000) [a "*prima*  
 20 *facie* case, combined with sufficient evidence to find that the employer's asserted  
 21 justification is false may permit the trier of fact to conclude that the employer  
 22 unlawfully discriminated" (underlined emphasis added)].<sup>2</sup>  
 23  
 24  
 25  
 26

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27 <sup>1</sup> The two documents that are attached are of no consequence. Exhibit A, if properly authenticated,  
 28 would establish only that at some point in her six-year career, Elliott was given a "Celebrities in Service  
 Award," and Exhibit B is a form document congratulating Elliott for completing five years of service.

<sup>2</sup> *Reeves* is a directed verdict case. However, the standard for a directed verdict mirrors that of a  
 summary judgment motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

1 Because Palms has articulated a legitimate, non-discriminatory reason for her  
2 termination – her serial violation of the rake policy – Elliott must produce specific and  
3 substantial evidence of pretext to survive summary judgment. *See, e.g., Vasquez v.*  
4 *County of Los Angeles*, 349 F.3d 634, 641-642 (9th Cir. 2004) (as amended); *Mondero*  
5 *v. Salt River Project*, 400 F.3d 1207, 1213 (9th Cir. 2005). Elliott has clearly failed to  
6 sustain this burden.  
7

8 Page 3 of the Opposition contends “there were four (poker room dealers) under  
9 investigation,” three of whom were 40 or older, thereby suggesting age played a role  
10 in the termination decision. There is no citation to the record to support that the  
11 investigation was so limited, and the Director of Surveillance, Mr. Sciulla, stated in his  
12 affidavit that “the Surveillance Department conducted a special observation . . . to  
13 determine whether the Poker Room dealers were following the rake guidelines” and  
14 that “[e]ach dealer was observed for a minimum of 30 minutes, and if multiple  
15 violations of the rake policy were noted on a particular dealer, further time was spent  
16 observing that dealer.” [See, Ex. B to the Motion ¶2 (emphasis added)]. Mr. Sciulla  
17 did not state the surveillance was limited to four dealers, and as noted in the Motion, a  
18 dealer older than Elliott - Mr. Delgadillo - was not terminated because he had  
19 substantially fewer infractions.  
20  
21

22 Finally, page 4 of the Opposition argues termination was too harsh a  
23 disciplinary action for someone who was supposedly “a model employee” with an  
24 “exemplary prior work history.” Even if Elliott had set forth specific facts  
25 establishing this was the nature of her prior work history, which she has not, the  
26 “quality of (the employer’s) business judgment is only relevant insofar as it suggests  
27 (its) decisions were explainable *only* as the product of illegal discrimination.”  
28

1 *Coghlan v. American Seafood Company*, 413 F.3d 1090, 1099 (9th Cir. 2005)  
2 (emphasis added) (citation omitted). If a termination decision is not the product of  
3 discrimination, its wisdom, correctness or fairness is of no concern to the court. *Diaz*  
4 *v. Eagle Produce Limited Partnership*, 521 F.3d 1201, 1214 n. 7 (9th Cir. 2008).  
5 Terminating an employee for 19 policy violations is not explainable only as a product  
6 of discrimination, making the merits of Elliott's termination irrelevant.  
7

8 ***Elliott's IIED Claim Fails For Lack***  
9 ***Of Extreme And Outrageous Conduct***

10 As the Motion noted, termination of employment, even for a discriminatory  
11 reason, does not generally constitute extreme and outrageous conduct. *Alam v. Reno*  
12 *Hilton Corporation*, 819 F.Supp. 905, 911 (D. Nev. 1993). Since Elliott cannot even  
13 establish a termination for a discriminatory reason, she clearly cannot establish the  
14 element of extreme and outrageous conduct and summary judgment is appropriate.  
15

16 Respectfully submitted,

17 FISHER & PHILLIPS LLP

18 Scott M. Mahoney, Esq.  
19 SCOTT M. MAHONEY, ESQ.  
20 3800 Howard Hughes Parkway  
21 Suite 950  
22 Las Vegas, Nevada 89169  
23 Attorneys for Defendant  
24  
25  
26  
27  
28

FISHER & PHILLIPS LLP  
3800 Howard Hughes Parkway, Suite 950  
Las Vegas, Nevada 89169

**CERTIFICATE OF ELECTRONIC SERVICE**

This is to certify that on the 1st day of June 2010, the undersigned, an employee of Fisher & Phillips LLP, electronically filed the foregoing Reply to Opposition to Motion for Summary Judgment with the U.S. District Court, and a copy was electronically transmitted from the court to the e-mail address on file for:

Dan M. Winder. Esq.

By: Lorraine James-Newman  
An employee of Fisher & Phillips LLP

**FISHER & PHILLIPS LLP**  
3800 Howard Hughes Parkway, Suite 950  
Las Vegas, Nevada 89169